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CC Docket #96-98
[redacted]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request by ALTS for Clarification	)	
for Clarification of the Commission's Rules	)	CCB/CPD 97-30
Regarding Reciprocal Compensation for	)	
Information Service Provider Traffic	)	
	)	

COMMENTS OF US XCHANGE, L.L.C.

US Xchange, L.L.C. ("USX") submits these comments in support of the request filed by the Association for Local Telecommunications ("ALTS") for expedited clarification of the Commission's rules regarding the rights of competitive local exchange carriers ("CLECs") to receive reciprocal compensation pursuant to section 251(b)(5) of the Telecommunications Act of 1996 ("Act") for the transport and termination of traffic to CLEC subscribers that are information service providers ("ISPs"). USX, through its affiliates, provides or plans to provide both facilities-based and resold local exchange services throughout the United States. To date, USX has executed interconnection agreements with Ameritech in Illinois, Indiana, Michigan, Ohio and Wisconsin. USX has also initiated interconnection negotiations with GTE. In addition to its plans to operate as a CLEC, USX recently acquiring Iserv Company, an ISP.

I. CLECS ARE ENTITLED TO RECIPROCAL COMPENSATION FOR TERMINATING CALLS TO ISPS.

Section 251(b)(5) of the Act imposes on each local exchange carrier the duty to establish "reciprocal compensation arrangements for the transport and termination of telecommunications." This requirement indicates that Congress understood that carriers would require compensation for

costs associated with the transport and termination of other carrier's traffic. Competition would not thrive, or exist, if a competitive carrier could not recover its costs of doing business.

In its *Local Competition Order*,[1] the Commission found that "the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic."[2] Several ILECs have now taken the position that calls to and from ISPs are "interexchange traffic," and thus not subject to reciprocal compensation. Their theory is that a call to an ISP provider does not "terminate" at the ISP provider's site, but instead terminates at the site of the source of the information that the ISP provider enables its customer to access. The ILECs fail to support this theory. Rather, the Act, the Commission, and even the ILECs by virtue of their own historic provisioning of such service to their ISP end user customers and execution of interconnection agreements, have all affirmed that a call from an end user to an ISP within the same LATA is a local call and, therefore, requires reciprocal compensation under the Act.

Pursuant to the Act and the Commission's *Local Competition Order*, ILECs have entered into reciprocal compensation agreements with CLECs for the transport and termination of local calls. These agreements provide for reciprocal compensation for all local traffic. No exception is made for local traffic to ISPs. Quite the contrary, as explained below, due to the historic treatment of local traffic to ISPs by ILECs, such traffic was expected to receive reciprocal compensation. Many ILECs

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1 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC Docket No. 96-98, at para. 155 (rel. August 8, 1996) ("*Local Competition Order*").

2 *Local Competition Order, First Report and Order* ¶ 1034.

have made reciprocal compensation payments to CLECs for the local traffic terminated with an ISP. It was only recently that ILECs changed their position.

II. A CALL FROM AN END USER TO AN ISP WITHIN THE SAME LATA IS A LOCAL CALL.

A local call is a call that originates and terminates within the same exchange. A call placed over the public switched telecommunications network is considered to be "terminated" when it is delivered to the Telephone Exchange Service bearing the called telephone number. The call is completed at that point, regardless of the identity or status of the called party.

Contrary to the ILECs' characterization, ISP calls are local exchange calls. Calls to an ISP provider are placed using the customer's *local* exchange number. The call "terminates" at the ISP's equipment. When the ISP accepts the call, answer supervision is returned and a *local* call has been established. The local call remains in effect for the duration of the Internet session, even though particular calls from the local ISP that are part of the session may be in effect for varying lengths of time.

As mentioned above, a call placed over the public switched network is "terminated" when it is delivered to the Telephone Exchange Service bearing the called telephone number. The fact that the signal may be routed to other destinations does not change the point of termination. The situation is no different from a conference call where a call is made to a local recipient who in turn may conference in a caller in another exchange. Although the initial caller's signals may be reaching a third party in another exchange, the initial call is still considered to "terminate" at the local

recipient's phone, and is considered a local rather than an interexchange call. These calls are in fact billed local rates.

III. THE COMMISSION TREATS CALLS FROM AN END USER TO AN ISP AS LOCAL.

The Commission requires local calls to ISPs to be treated as local calls by LECs regardless of whether the ISP reformats or retransmits information received over such calls to or from further interstate destinations.[3] The Commission has repeatedly affirmed the rights of ISPs to employ Telephone Exchange Services, under *intrastate* tariffs, to connect to the public switched network.[4] The mere fact that an ISP may enable a caller to access the Internet does not alter the legal status of the connection between the customer and the ISP as being a local call. The local call to the Telephone Exchange Service of an ISP is a separate and distinguishable transmission from any subsequent Internet connection enabled by the ISP.

The Commission's recently released *Report and Order* on Universal Service and *First Report and Order* on Access Charge Reform further confirm that a call from an end user customer to an end user ISP is a local call.[5] In the Universal Service Order, the Commission found that Internet access

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[3] *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, 2633 (1988) ("*Amendments to Part 69*").

[4] *Amendments to Part 69*, para. 2 n.8. In its First Report and Order regarding Access Charge Reform, the Commission reaffirmed this position explicitly and declined to impose access charges on ISPs. *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262, paras. 344-348 (rel. May 17, 1997) ("*Access Charge Order*").

[5] *In the Matter of Federal-State Joint Board on Universal Service*, Report and Order, CC Docket No. 96-45 (rel. May 8, 1997) ("*Universal Service Order*"). *Access Charge*

consists of *severable* components: the connection to the Internet service provider via voice grade access to the public switched network is one component, and the information service subsequently provided *by the ISP* is another component. The first component is a simple *local* call. Pursuant to the Act and the Commission's *Local Competition Order*, such calls require reciprocal compensation.

Further evidence of the *local* character of the first component of the Internet service is the Commission's treatment of ISPs under the Act. The Commission does not treat ISPs as interexchange carriers, in as much as it does not require ISPs to contribute to the Universal Service Fund, a fund to which *all* interstate carriers must contribute.

In the *Access Charge Order*, the Commission determined that access charges should not be imposed on ISPs. The Commission wanted to maximize the number of end users that could reach an ISP *"through a local call."*[6] The Commission has confirmed that a *local* call is completed between an end user and an ISP. It is clear that to date the Commission has considered the first component of Internet access as a local connection.

IV. THE ILECS TREAT CALLS FROM AN END USER TO AN ISP AS LOCAL.

Further proof of the local nature of calls from end users to CLEC ISPs is the ILECs treatment of such calls to their own ISP customers. Most, if not all, ILECs charge their own customers local rates for traffic to ISPs and therefore classify such traffic as local for purposes of interstate separations. This is a clear demonstration that the ILECs treat the call from its customer to the ISP as a *local* call. At least up to this point in time, treating such calls as local has been beneficial to

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Order, Docket No. 96-262 (rel. May 17, 1997).

[6] *Access Charge Order*, n.502 (emphasis added).

ILECs. Now that the ILECs view this position as detrimental, they are attempting to recharacterize such traffic.

ILECs should not be permitted to unilaterally change the characterization of how ISPs are served especially when it appears that the ILECs objective is to injure its competition. First, the ILECs have never raised this issue when they were the sole providers of the local service to the end user, ISP. Rather, the ILECs benefited for many years by providing local service to ISPs. Now, the ILECs want to preclude their competitors from benefiting from terminating such traffic upon entry into the local exchange market. Second, the ILECs treatment of such calls as local enabled them to provision service to ISPs. If the traffic were truly interstate then the Regional Bell Operating Companies ("RBOCs") would have been in violation of Section 271 of the Act. The ILECs should not be permitted to change in midstream when the "benefit" may shift to other competitive carriers.

V. CLECs HAVE RELIED ON THE ILECS PROVISIONING OF SERVICE IN THE LOCAL EXCHANGE MARKET.

The Telecommunications Act of 1996 changed the face of the telecommunications market in the United States by, among other things, mandating competition in the local exchange market. Pursuant to the Act, the Commission established rules to implement the Act which plainly changed the regulatory environment in which carriers offered service. Relying on this new regime for the industry, numerous carriers, such as USX, have developed business plans and negotiated interconnection agreements to enter the local exchange market as directed by the Act.

In developing business plans, new entrants observed the supply and demand of local exchange services in the local exchange market. As part of their service offerings, the ILECs

provide over their respective networks local exchange services to end user customers, including some business customers operating as ISPs. For completing calls from one end user to another end user, including an ISP, the ILECs have always charged local calling rates. USX, recognizing an opportunity to compete with provisioning local exchange service to ISPs, incorporated such end users into its business plan. USX relied on this environment of ILECs providing local service to ISPs when developing its business plan.

Many new entrants have relied on the interconnection agreements entered into by ILECs which clearly require all local calls, including local calls to ISPs, to receive reciprocal compensation. Both the new entrants who have entered into these agreements and the new entrants who have monitored such agreement have anticipated compensation for the cost of terminating traffic to ISPs. This again is vital to the CLECs business plan and, therefore, vital to their ability to stay in business and promote competition.

VI. SEVERAL STATE COMMISSIONS HAVE AGREED THAT A CALL FROM AN END USER TO AND ISP IS A LOCAL CALL.

On May 29, 1997, the staff of the New York Department of Public Service condemned action taken by an affiliate of NYNEX, New York Telephone Company ("NYT"). NYT had unilaterally attempted to revise the terms of an interconnection agreement for reciprocal compensation for traffic delivered to ISPs. The Department informed NYT that the interpretation expressed in NYT's letters regarding reciprocal compensation had not been approved by the Department and that it was at odds with NYT's treatment of this traffic as intrastate in its assessment of usage charges to other customers. NYT was instructed, and NYT subsequently agreed, to continue to pay reciprocal

compensation for traffic delivered to ISPs.

At least five other states have rejected the same ILEC argument advanced by NYT in New York. The states of Arizona,[7] Colorado,[8] Minnesota,[9] Oregon[10] and Washington[11] have rejected the argument by RBOCs that traffic originated by or terminated to ISPs should be exempted from reciprocal compensation arrangements under their respective interconnection agreement. Those states declined to treat traffic to an ISPs any differently than other local traffic.

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[7] *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rate, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 *et al.*, at 7 (Arizona Corp. Comm. Oct. 29, 1996).

[8] *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc.*, Decision Regarding Petition for Arbitration, Docket No. 96A-287T, at 30 (Col. PUC Nov. 5, 1996).

[9] *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with U S West Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729, at 75-76 (Minn. PUC Dec. 2, 1996).

[10] *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Commission Decision, Order No. 96-324, at 13 (Oregon PUC Dec. 9, 1996).

[11] *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S West Communications, Inc., Pursuant to 47 U.S.C. § 252*, Arbitrator's Report and Decision, Docket No. UT-960323, at 26 (Wash. Utils. and Transp. Comm. Nov. 8, 1996).

VII. CONGRESS' INTENT REQUIRES THAT CLECS RECEIVE RECIPROCAL COMPENSATION FOR TERMINATION OF CALLS TO ISPS.

Section 230(b)(2) of the Act states that it is the policy of the United States to "preserve the vibrant and *competitive* free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[12] The ILEC's position that a call from an end user to an ISP is not a local call threatens the Act's competitive mandate. Any carrier that terminates calls to an ISP incurs costs in terminating such calls (the same costs incurred in terminating any local call to an end user). Most ILECs currently have a large percentage, if not all, of the local market and, therefore, they control a majority of the originating minutes in their territory. With the ILECs handling the majority of origination minutes, CLECs, such as US Xchange would handle mostly terminating minutes. If the ILEC's position is adopted, new entrants will be forced to terminate these calls without compensation. Under this scenario, CLECs would not be able to furnish service to an ISP, since provisioning that service would result in immense, uncompensated costs. This would leave most ILECs with a *de facto* monopoly over ISP end users. Such an environment would also deprive ISP end users of a competitive choice. This is a clear violation of the competitive mandate of the Act.

Another alarming possibility is that ILECs may gain monopolistic control over the Internet access service market. Many ILECs have begun to offer their own Internet access service to consumers. ILECs may gain monopoly power over this market by increasing the costs for network access; thereby, squeezing out the competition. By driving ISP competition out, the ILEC would

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12 47 U.S.C. §230(b)(2) (emphasis added).

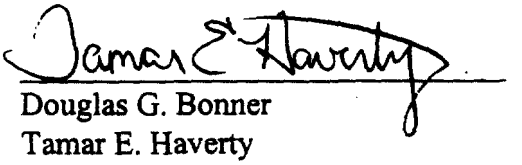
also be a *de facto* monopoly provider over access to the Internet. Hence, the ILEC could potentially control both markets: providing local exchange service to ISPs and access service to ISPs.

As a monopoly provider, ILECs will have no incentive to ensure that their prices are cost-based; nor incentive to efficiently provide service to ISPs. The artificial advantage would allow ILECs to win customers even though a competing carrier may be a more efficient provider in serving the customer.

VIII. CONCLUSION

The environment contemplated by ILECs is extremely distressing. Competitive LECs will be denied significant benefits of competitive entry at a critical stage of their development, and ISPs will potentially be denied a competitive carrier choice. Compounded by the potential result of allowing ILECs to maintain monopolistic control over several markets, the ILEC's characterization of Internet traffic must be rejected as a violation of the Telecommunications Act of 1996.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that on the 17th day of July, 1997, copies of the foregoing Comments of US Xchange, L.L.C. were served via courier on the following:

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